

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CARLENE HARDING,

Claimant,

v.

GREEN TEA HP,

Employer,
Defendant.

IC 2012-025152

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed April 18, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper. Claimant filed her Complaint on January 7, 2013, through Jason S. Thompson, of Brady Law, Chartered, Boise Idaho. On February 1, 2013, Claimant filed her Notice of Intent to Take Default, and on March 15, 2013, she filed her Motion for Entry of Default with supporting documentation. Having received nothing from Defendant, on April 26, 2013, the Commission entered default against Green Tea HP¹.

On March 3, 2014, Claimant filed an Application for Default Award and Judgment with her supporting affidavits, exhibits, and brief. The matter was deemed under advisement on March 21, 2014, when the materials were routed to the above Referee.

ISSUES

The issues to be decided are;

1. Whether Claimant is entitled to benefits from Defendant pursuant to Idaho Code Title 72 and the amount thereof, including penalties and attorney fees, and;

¹ Green Tea HP may be a dba owned by Roger Hendrix, Jr., and Josh Smith. For the purpose of this discussion, collectively they will be referred to as "Defendant."

2. Whether the Commission should retain jurisdiction over the claim until Claimant is declared medically stable and is able to determine additional medical expenses, TTD, PPI, and PPD benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits A-N, submitted with the Affidavit of Jason Thompson;
3. Claimant's Sworn Declaration in support of her Application; and
4. Claimant's Memorandum of Medical Bills, Attorney fees, and Costs.

After having considered the above evidence and Claimant's arguments, the Referee submits the following Findings of Fact and Conclusions of Law for review by the Commission.

FINDINGS OF FACT

BACKGROUND AND MEDICAL

1. Claimant was born in 1963 and resided in Twin Falls County at the time of her injury.
2. According to a Default Judgment obtained by the State of Idaho against Green Tea HP for failure to obtain workers' compensation insurance in the state of Idaho (Claimant's Exhibit J), Green Tea HP is an assumed business name of Roger Hendrix, Jr. and Josh Smith who operate Defendant Green Tea HP from Lehi, Utah.
3. In November 2011, Claimant began working for Defendant as a sales clerk at a kiosk located at the Magic Valley Mall.
4. On September 16, 2012, while in the course and scope of her employment with Defendant, Claimant was placing water bottles on a shelf of the kiosk when the shelf suddenly

broke loose and fell approximately two feet, striking Claimant's right hand and wrist. As a direct result of this incident, Claimant suffered injuries to her right wrist.

5. On September 16, 2012, Claimant presented at St. Luke's Magic Valley Regional Medical Center Emergency Department for her wrist injury. There she was initially examined by Adam Bowman, M.D., who assessed right wrist contusion. Claimant was given a splint to use as needed, and advised to follow up with an occupational health provider in three to five days.

6. On September 19, 2012, Claimant presented to Douglas Stagg, M.D. at St. Luke's Occupational Medicine Department for follow-up care. He confirmed the initial diagnosis of wrist contusion.

7. On October 2, 2012, Claimant again presented to Dr. Stagg. By this time she was complaining of worsening pain in her right wrist and at the base of her right thumb. Claimant noted the pain made it difficult to perform her dog grooming business.² Dr. Stagg diagnosed persistent right wrist contusion with development of de Quervain's tenosynovitis.

8. After her pain continued to worsen, Dr. Stagg sent Claimant to St. Luke's Occupational Therapy Department to begin therapy.

9. Occupational therapy and home exercises helped Claimant's condition, but the relief was transient. By December 18, 2012, Claimant's persistent pain led Dr. Stagg to recommend Claimant see Tyler Wayment, M.D., a hand surgeon, for further analysis and treatment.

² Claimant asserts she was fired by Defendant shortly after her industrial accident. In her declaration, she asserts she owns a dog grooming business. It is not clear from the record if she owned/operated the business while working for Defendant, or started it after she was fired. In any event, she apparently was self employed as a dog groomer by October, 2012, if not earlier.

10. On January 21, 2013, Claimant saw Dr. Wayment for her continuing right wrist pain. He diagnosed de Quervain's tenosynovitis and suggested surgery. To date, Claimant has not had the recommended surgery due to financial constraints.

WORKERS' COMPENSATION ISSUES

11. On the day of her accident, Claimant gave notice of the accident and injury to her manager, Tami Martinez. A First Report of Injury was filed on that same day.

12. Defendant has not provided any medical or income benefits pursuant to Idaho Code Title 72. On January 4, 2013, Claimant filed and served a Workers' Compensation Complaint against Defendant. On January 31, 2013, Claimant filed and served via certified mail a 21 day Notice of Intent to Take Default on Defendant. On March 13, 2013, Claimant filed a Motion for Entry of Default, which was granted, and Default was entered against Defendant on April 26, 2013.

13. The State of Idaho Attorney General filed a complaint against Defendant for failure to obtain workers' compensation insurance, and on March 1, 2013, a Default Judgment was entered against Defendant.

DISCUSSION AND FURTHER FINDINGS

14. **Covered Accident.** Claimant must prove not only that she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996). Claimant suffered an injury as the result of a covered industrial accident.

15. **Notice.** Idaho Code § 72-701 requires that notice of an accident must be given to the employer not later than sixty days post accident. Here Claimant gave notice and a First

Report of Injury was filed in a timely manner; she has complied with all notice requirements required under Idaho Code Title 72.

16. **Causation.** Having established the occurrence of an industrial accident, Claimant has the further burden of proving the condition for which compensation is sought is causally related to the accident. Claimant has made a *prima facie* case showing that her right wrist condition for which she sought medical care is causally related to the accident in question.

17. **Medical care.** Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

18. As a result of her September 16, 2012 industrial accident, Claimant incurred reasonable and necessary medical expenses for treatment of her right wrist in the amount of \$4,846.48 as of February 27, 2014, the date when Claimant compiled her medical records for her Default Award Application. It is anticipated Claimant will incur further medical expenses for covered medical treatment in the future, including surgery and related expenses, as recommended by Dr. Wayment.

19. The current amount due and owing to Claimant from Defendant for medical benefits pursuant to Idaho Code § 72-432 is \$4,846.48. Defendant must also provide reasonable medical treatment causally related to Claimant's September 16, 2014 industrial accident which may be required after February 27, 2014, including, but not limited to surgery recommended by Dr. Wayment to treat her industrial de Quervain's tenosynovitis.

20. **Temporary Disability.** Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980).

21. Claimant has failed to prove she is entitled to past temporary disability benefits. She was released to work almost immediately following the subject accident, despite her painful condition. While Claimant may qualify for disability payments in the future, and specifically post-surgery, her present right to such benefits is speculative at the present time.

22. **Permanent Impairment and Disability.** Permanent impairment "is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved...." Idaho Code § 72-422. Permanent disability considers the Claimant's permanent impairment, together with various nonmedical factors, as they affect her ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). Since maximal medical

rehabilitation has not yet been achieved, it is premature to discuss PPI and any potential for permanent disability in excess of PPI at the present. These related issues are reserved.

23. **Idaho Code § 72-210 penalties.** Idaho Code § 72-210 allows Claimant to collect reasonable attorney fees, costs, and a statutory penalty equal to 10% of the compensation awarded from an uninsured employer. At the time of Claimant's industrial accident, Defendant had failed to insure liability under the Idaho Workers' Compensation Laws.

24. Claimant's contract with her counsel is consistent with the provisions of IDAPA 17.02.08.033 *et seq.* Claimant's counsel requests reasonable attorney fees. While he provides in Claimant's Exhibit M his hourly billing and requests payment based upon his hourly charges, Claimant's employment contract provides for attorney fees of 25% of any amounts recovered without necessity of a hearing and 30% of any amounts recovered or awarded by the Commission after hearing. In the present case, as evaluated by the factors enumerated in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2 990 (1984), given the anticipated time, effort, and issues involved in proceeding against an uninsured employer, the fees customarily charged for workers' compensation matters, the possible recovery, the time constraints imposed, the length of the attorney-client relationship, Claimant's counsel's experience, Claimant's limited ability to pay for legal services, and the risk of no recovery given an uninsured employer, a 30% contingent fee is reasonable. There is little difference between an oral hearing and a submitted hearing in this matter. Preparing Claimant's testimony, the exhibits, and briefing takes as long or longer as utilizing oral testimony. In both cases, the submissions trigger a duty upon the Commission to prepare its Findings of Fact, and a final Order. For the purpose of this proceeding, Claimant has had her hearing on the issues presented herein.

25. The record herein establishes workers' compensation benefits currently due to Claimant, the 10% penalty, and attorney fees and costs owing pursuant to Idaho Code § 72-210, and are calculated below.

Amounts presently owing pursuant to Idaho Code §§ 72-432:

Medical expenses	\$ 4,846.48
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Amounts owing pursuant to Idaho Code § 72-210:

10% penalty	\$ 484.65	
Attorney fees	\$ 1,453.94	
Costs	<u>\$ 29.60</u>	
		<u>\$ 1,968.19</u>

Total		<u>\$ 6,814.67</u>
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26. **Total compensation, attorney fees, costs, and penalties presently due.** The total amount of workers' compensation benefits, attorney fees, costs, and penalties presently due and owing to Claimant from Defendant is \$6,814.67.

27. **Retained Jurisdiction.** The Commission shall retain jurisdiction over the claim until Claimant is declared medically stable and is able to determine additional medical expenses, TTD, PPI, and PPD benefits.

CONCLUSIONS OF LAW

1. Claimant has proven she suffered a compensable industrial accident on September 16, 2012.

2. Claimant has proven she is presently entitled to reasonable medical benefits for her September 16, 2012 industrial injury in the amount of \$4,846.48.

3. Claimant has proven she is entitled to receive, and Defendant is liable for the reasonable cost of, future reasonable medical care proximately related to her industrial accident of September 16, 2012, which includes but is not limited to, surgery suggested by Dr. Wayment.

4. Claimant has proven she is presently entitled to attorney fees, costs, and a 10% penalty pursuant to Idaho Code § 72-210 in the amount of \$1,968.19.

5. The total amount of workers' compensation benefits, attorney fees, and penalties presently due and owing to Claimant from Defendant is \$6,814.67.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final Order.

DATED this 25th day of March, 2014.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JASON S THOMPSON
BRADY LAW CHTD
2537 W STATE ST STE 200
BOISE ID 83702

GREEN TEA HP
PO BOX 1053
LEHI UT 84043

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CARLENE HARDING,

Claimant,

v.

GREEN TEA HP,

Uninsured Employer,

Defendant.

IC 2012-025152

ORDER

Filed April 18, 2014

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion(s) of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion(s) of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven she suffered a compensable industrial accident on September 16, 2012.
2. Claimant has proven she is presently entitled to reasonable medical benefits for her September 16, 2012 industrial injury in the amount of \$4,846.48.
3. Claimant has proven she is entitled to receive, and Defendant is liable for the reasonable cost of, future reasonable medical care proximately related to her industrial accident of September 16, 2012, which includes but is not limited to, surgery suggested by Dr. Wayment.
4. Claimant has proven she is presently entitled to attorney fees, costs, and a 10% penalty pursuant to Idaho Code § 72-210 in the amount of \$1,968.19.

ORDER - 1

5. The total amount of workers' compensation benefits, attorney fees, and penalties presently due and owing to Claimant from Defendant is \$6,814.67.

DATED this 18th day of April, 2014.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Chairman

/s/
R.D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

JASON S THOMPSON
BRADY LAW CHTD
2537 W STATE ST STE 200
BOISE ID 83702

GREEN TEA HP
PO BOX 1053
LEHI UT 84043

jsk

/s/